

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

EASTER SEALS NEW YORK,

-and-

Case No. 03-RC-212875

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 86.

**EASTER SEALS NEW YORK'S REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR'S SUPPLEMENTAL DECISION REGARDING OBJECTIONS TO THE
ELECTION AND CERTIFICATION OF REPRESENTATIVE**

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I. INTRODUCTION

Pursuant to 29 C.F.R. §§ 102.69(c)(2) and 102.67 of the Rules and Regulations of the National Labor Relations Board (“Board”), Easter Seals New York (“Easter Seals” or “ESNY”) hereby requests review of the Regional Director’s (“RD”) February 26, 2018 Supplemental Decision Regarding Objections to the Election and Certification of Representative (“Decision”) and a Stay of the Certification pending review in Case No. 03-RC-212875. A copy of the Decision is attached hereto as “Exhibit A.”

Compelling reasons exist for the Board to review the Decision which undercuts the Board’s role in safeguarding employees’ confidential information in a voter eligibility list. The Board’s 2014 Election Rules require employers to provide a petitioning union in a representation election with an enhanced voter eligibility list that includes employee names and addresses, employees’ phone numbers, email addresses, work locations, shift information, and job classifications. 29 CFR § 102.62(d). The Election Rules provide limited protection for employees’ confidential information by requiring that: “the parties shall not use the [voter eligibility] list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.” *Id.* The Board’s decision to include this protection is rendered superfluous by the Decision.

The IBEW intentionally violated the Board’s Election Rules when it used a voter eligibility list from a 2017 election in Case No. 03-RC-190611 involving Easter Seals and the Retail, Wholesale and Department Store Union, UFCW, AFL-CIO, (“RWDSU”) to contact

employees in this election in advance of filing the Petition. (“2017 Election”). The RD erred as a matter of law when he ignored the clear evidence of the IBEW’s breach of Easter Seals’ employees’ privacy rights by the intentional misuse of the 2017 voter list, failed to recognize the serious impact such a breach has on potential voters in a representation election, and failed to overturn the results of the election based on the IBEW’s violation of the Board’s rules. The evidence demonstrates that at least two Easter Seals employees were contacted by the IBEW prior to the filing of the Petition and/or service of the voter list in this election. The inference to be drawn from the Offer of Proof is that more Easter Seals employees were prematurely contacted by the IBEW. The RD’s refusal to conduct a full investigation or hearing foreclosed any attempts to demonstrate the full extent of the IBEW’s violation of the Board’s Rules and failed to protect employees’ privacy rights.

The Board should also grant review because the RD erred by: (i) failing to recognize that the misuse of the voter list in conjunction with the amended Board rules governing elections as applied to Easter Seals in this case violated Easter Seals’ due process rights; (ii) certifying an election tainted by the IBEW’s solicitation of supervisors to campaign in favor of union representation during the organizational campaign; and (iii) ignoring the IBEW’s conduct in unlawfully promising voters that it would indefinitely reduce the dues increase that the IBEW had publicized on its website.

Finally, the Board should grant review in light of its recent decisions and pronouncements concerning revisiting the 2014 amendments to the Board’s Election Rules and

the Board's "Request for Information Regarding the Representation Election Regulations."

<https://www.nlr.gov/news-outreach/news-story/request-information-regarding-representation->

[election-regulations.](#) By granting review, the Board will have the opportunity to review these important issues concerning the Election Rules.

II. REASONS FOR GRANTING REVIEW

Pursuant to Sections 102.67(d)(1)-(4) of the Board's Rules and Regulations, the following compelling reasons exist for the Board to grant Easter Seals' Request for Review and a Stay of the Certification:

1. The RD erred as a matter of law by ignoring the Board's Election Rules on the use of employees' confidential information in a voter eligibility list which requires that: "the parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." 29 CFR § 102.62 (d). The IBEW deliberately violated this rule and the RD's failure to find a violation and issue an effective remedy by overturning the results of the election was error.

2. The RD's failure to recognize that the amended Board Election rules as applied to Easter Seals in this case violated Easter Seals' due process rights by sanctioning the IBEW's intentional misuse of a voter eligibility list from the 2017 Election to bypass the already shortened time frame provided for by the amended Board's Election Rules.

3. The RD's erred in finding that Easter Seals waived its constitutional right to due process of law by entering into a Stipulated Election Agreement.

4. The RD erred as a matter of law in certifying an election tainted by the IBEW's solicitation of supervisors to campaign in favor of union representation.

5. The RD erred as a matter of law by ignoring the IBEW's conduct in promising voters that it would indefinitely reduce dues notwithstanding that it had recently publicized on its website an amendment to its Constitution which resulted in a dues increase.

III. STATEMENT OF THE CASE

On January 11, 2018, Bruce Beal, an organizer for the International Brotherhood of Electrical Workers, Local 86 ("IBEW" or "Union") filed a Petition for Certification of Representative (hereafter, the "Petition") seeking to represent "[a]ll full time and regular part time Direct Care Associates, Senior Support Specialists, and Teacher Assistants employed by Easter Seals/Kessler Center ..." A copy of the Petition is attached hereto as "Exhibit B." On January 18, 2018, the RD approved a Stipulated Election Agreement between Easter Seals and the Union. A copy of the Stipulated Election Agreement is attached hereto as "Exhibit C."

The election was held on February 7, 2018. On February 14, 2018, Easter Seals filed timely Objections to the Election (hereinafter "Objections"). A copy of the Objections and Offer of Proof are attached as "Exhibit D."

On February 26, 2018, the Regional Director issued the Decision, whereby he overruled the Objections and issued a Certification of Representative. For the reasons explained below, the Board should grant review of the Decision.

ARGUMENT

A. THE RD ERRED BY REFUSING TO SUSTAIN EASTER SEALS' OBJECTION THAT THE IBEW's DELIBERATE MISUSE OF THE VOTER ELIGIBILITY LIST WARRANTED A NEW ELECTION

The RD erred when he failed to sustain Easter Seal's Objection that the IBEW engaged in objectionable conduct when it deliberately misused a voter eligibility list from the 2017

Election (Case No. 03-RC-190611) in this election. The IBEW's deliberate misconduct warranted a new election.

Bruce Beal, the IBEW organizer in the current election, worked as the organizer for the RWDSU in the 2017 Election. Mr. Beal was provided with a copy of voter eligibility list in the RWDSU election because he was designated as the RWDSU's representative. Shortly after the 2017 Election, Mr. Beal left the RWDSU and began working for the IBEW, where he remains currently employed. Mr. Beal and the IBEW intentionally used confidential employee contact information from the 2017 Election voter eligibility list to contact Easter Seals employees prior to the filing of this Petition and/or the service of the voter eligibility list in this election.

Easter Seals provided the RD with an Offer of Proof that included the names of at least two individuals that were contacted by the IBEW and who did not provide their personal contact information to the Union. Both of these individuals were listed on the 2017 voter eligibility list because they were eligible voters in that election. They were not on the current list, however, because they were no longer in the bargaining unit. The RD's failure to conduct an investigation or hold a hearing to uncover the extent of the Union's violation constitutes reversible error.

The Election Rules require an employer to provide a list of eligible voters-- commonly referred to as an "*Excelsior* list"-- to both the Board and the other party or parties within two business days of the Regional Director's approval of a stipulated election agreement or direction of an election. *See* Section 102.67 (l);102.62(d). The Election Rule further requires that the list include "the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal

cellular ('cell') telephone numbers) of all eligible voters” as well as of “individuals who . . . will be permitted to vote subject to challenge.” *Id.*

Sections 102.62(d) and 102.67(l) of the NLRB Rules and Regulations seek to protect employee’ confidential information that is disclosed in a voter eligibility list by strictly limiting the use of such information: “[t]he parties *shall not* use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.” The RD’s finding that there was no direct harm to voters ignores Board law that “tangible evidence” of prejudice to a party who did not timely receive an *Excelsior* list is *not* required. *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998).

The IBEW deliberately violated 102.62(d) when it used the voter eligibility list from the 2017 Election to solicit voters for its current organizing drive. The IBEW was not a party to the prior proceedings and this is not a related matter to the 2017 Election. The RD’s Decision to ignore the IBEW’s conduct and his failure to provide an effective remedy for such conduct was error.

The Board has recognized the risk inherent in disclosing employees’ personal information and possible misuse by a union in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966). “[A] union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending on receipt thereof, to withdraw the election petition and utilize its newly acquired information as a basis for further organizational efforts.” *Id.* at 1244 fn. 20.

The *Excelsior* Board discussed certain safeguards from potential misuse of the voter list, *e.g.* the thirty percent showing requirement and the six month hiatus on filing a petition once one has been withdrawn, yet those safeguards are inapplicable here. Mr. Beal worked for the

RWDSU when he obtained employee information then deliberately misused that information on behalf of the IBEW. Under these circumstances, there is no possible safeguard in place to protect voter information shared with one union from being misused by another.

The Board further stated in *Excelsior Underwear* that it reserves the right to provide remedies if voter contact information was misused. 156 NLRB at 1244. Such remedies may include setting aside election results, seeking injunctive relief or finding that misuse of the list constitutes an unfair labor practice. The NLRB General Counsel has recently stated that a party who decides to raise allegations of misuse of the voter list may do so by filing objections to the election or an unfair labor practice charge. *See* General Counsel Memorandum GC 15-06 (April 6, 2015).

“[T]he clear language of Section 102.62(d) does not afford regional directors the discretion to excuse parties from complying with the voter-list service requirement... In enacting the Amended Rules, the Board deliberately created certain new bright-line provisions and consequences for non-compliance.” *URS Federal Svs., Inc.*, 365 NLRB No. 1 (Dec. 18, 2016), slip op at 2. Here, the Board should protect the employees from the improper use of their personal information and enforce the plain language of the law which prohibited the IBEW from engaging in the conduct complained of in this election.

Moreover, the RD’s misinterpretation of 102.62(d) undercuts any real remedy against unions for violations of the *Excelsior* rule by ignoring the very real harm to employees’ when their personal and confidential information has been compromised. In today’s day and age no one is safe from the dangers of data piracy. The risks of falling victim to hacking, ‘phishing’ attacks, and/or identity theft are all increased by the volume of unwanted email or text message engagement directed at employees. An increasing number of federal laws recognize this very

real threat to employee's privacy rights. The RD's Decision renders the Board Rule aimed at protecting employees' confidential information meaningless.

In situations like this, courts have long recognized legitimate concerns over union abuses of confidential information. *See e.g., JHP & Associates v. NLRB*, 360 F.3d 904, 911-12 (8th Cir. 2004) ("Our court has recognized "employees do not have an extreme privacy interest in their names, which are commonly known in the workplace, but have a greater privacy interest in protecting the location of their homes, even though there is no evidence of threats of violence."); *Chicago Tribune Co. V. NLRB*, 79 F3d. 604, 608 (7th Cir 1996). Indeed, the Board has recently recognized the importance of protecting employee confidential information when it found that an employer's no-camera rule which the employer justified in part because it "limits the risk that employees' personally identifiable information will be released...[and] constitute[s] legitimate and compelling justification for these restrictions." *See The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), slip op at 18-19.

The RD misreads the comments to the Board Rules in the Federal Register when he erroneously limits the instances of "misuse" to instances where a union sold the list to telemarketers, provided it to a political campaign or used the list to harass, coerce or rob employees" Decision at 2 (citing to Fed. Reg. at 74358). In fact the Board's comments preface that list by the words "for example" demonstrating the Board intended the list to be non-exhaustive. For all of the aforesaid reasons, the Board should provide an effective remedy for a deliberate violation of the Board's Election Rules.

B. THE RD ERRED BY IGNORING EASTER SEAL'S OFFER OF PROOF AND REFUSING TO INVESTIGATE AND HOLD A HEARING CONCERNING THE IBEW'S DELIBERATE MISUSE OF THE VOTER ELIGIBILITY LIST

Easter Seals submitted an Offer of Proof, which the RD ignored, stating that it would prove that the IBEW sent unsolicited letters to two Easter Seals employees, Mr. Kelvin Reaves and Mr. Jentavious Sampson. Both were eligible voters in the 2017 election and both had their confidential contact information included in the 2017 *Excelsior* list. A copy of the IBEW's letter along with a redacted 2017 voter eligibility list with Messrs. Reaves and Sampson's information is included in the Offer of Proof attached as Exhibit D. Messrs. Reaves and Sampson were not on the 2018 voter eligibility list. Easter Seals further stated to the RD in its Offer of Proof that Mr. Reaves and Mr. Sampson would both testify that they did not sign union authorization cards or supply the Union with their home address or personal contact information, but that the Union nevertheless sent them correspondence during the election period while they were employed as supervisors at Easter Seals.

The RD's erroneous conclusion that the reasonable inference to be drawn from the IBEW's letter is that the Union received Messrs. Reaves' and Sampson's information from voluntarily submitted authorization cards completely ignores that both would testify that neither signed such authorization cards. Decision at 2-3. This "reasonable inference" is wrong and would have been contradicted by direct testimony had the RD conducted an investigation and had Easter Seals been granted a hearing.

Where, as here, the Board has failed to adequately review an employer's offer of proof the courts have granted employer's request for review and remanded the case for further proceeding. *See e.g., NLRB v. Tito Contractors, Inc.*, 847 F.3d 724 (D.C. Cir. 2017). More

likely, the IBEW contacted more than just these two employees. The RD's Decision foreclosed any investigation to uncover the extent of the Union's violation.

C. THE RD ERRED BY FAILING TO RECONCILE THE GROWING BODY OF FEDERAL LAW PROTECTING EMPLOYEE PRIVACY RIGHTS

The compelled disclosure of employees' private information fails to account for, let alone respect, an employee's choice under Section 7 of the Act to refrain from supporting labor organizations. Additionally, the forced disclosure of employees' private information undermines national policy, as evinced by an increasing number of federal statutes, to enhance every citizen's control over the disclosure of their private information.

In *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) the Supreme Court stated:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Examples of federal statutes protecting individual's privacy rights include the following:

- The *Fair Credit Reporting Act of 1970* (FCRA) sets forth rights for individuals and responsibilities for consumer "credit reporting agencies" in connection with the preparation and dissemination of personal information in a consumer report. Under the FCRA, consumer reporting agencies are prohibited from disclosing consumer reports to anyone who does not have a permissible purpose.
- The *Family Educational Rights and Privacy Act of 1974* governs access to and disclosure of educational records to parents, students, and third parties.
- The *Right to Financial Privacy Act of 1978* restricts the ability of the federal government to obtain bank records from financial institutions and sets forth procedures for the federal government's access to bank customer records.

- The *Cable Communications Policy Act of 1984* limits the disclosure of cable television subscriber names, addresses, and utilization information for mail solicitation purposes.
- The *Video Privacy Protection Act of 1988* regulates the treatment of personal information collected in connection with video sales and rentals.
- The *Driver's Privacy Protection Act of 1994* regulates the use and disclosure of personal information from state motor vehicle records.
- The *Health Insurance Portability and Accountability Act of 1996* protects patient health information.
- The *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, limits the use and disclosure of customer proprietary network information by telecommunications service providers and provides a right of access for individuals.
- The *Children's Online Privacy Protection Act of 1998* requires parental consent to collect a child's age or address and requires sites collecting information from children to disclose how they plan to use the data.
- The *Gramm-Leach-Bliley Act of 1999* requires financial institutions to disclose their privacy policies to their customers. Customers may opt out of sharing personal information, and the institutions may not share account numbers with non-affiliated telemarketers and direct marketers.
- The *Telemarketing and Consumer Fraud and Abuse Prevention Act* enables the Federal Trade Commission to protect consumers from telemarketing deception and abuse.

Contrary to the Board's obligations to safeguard employees Section 7 rights, the RD erred because he made no effort to administer the Act in a way that is consistent with other federal laws. See General Counsel Memorandum GC 18-02; *Boys Markets, Inc. v. Retail Clerks Union, Local 770* 398 U.S. 235, 251 (1970); *Hoffman Plastics Compounds v. NLRB* 535 U.S. 137, 144 (2002); *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). The RD's failure to acknowledge the inherent conflict between the deliberate disclosure of employee confidential information without any accommodation to the compelling federal and state

interest in protecting employee's privacy rights warrants granting this Request for Review and overturning the election.

D. THE RD ERRED BY FAILING TO FIND THAT THE MISUSE OF THE EXCELSIOR LIST COUPLED WITH THE BOARD'S ACCELERATED ELECTION RULES DEPRIVED EASTER SEALS OF DUE PROCESS UNDER THE LAW AS APPLIED IN THIS CASE

Easter Seals urges that its rights to due process of law under the Administrative Procedures Act, the National Labor Relations Act and the Constitution are being violated as the revised rules are applied by the Board's refusal to provide it with adequate time to prepare for a hearing, consult with legal counsel and prepare for an election. *See European Imports, Inc.*, 365 NLRB No. 41 (2017) (Acting Chairman Miscimarra's Dissent).

The fundamental elements of procedural due process are notice and an opportunity to be heard. *The Earthgrains Co.*, 351 NLRB 733, 735 (2007); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 396, 313 (1950). Congress incorporated these fundamental notions of due process into the Administrative Procedures Act which states, "persons entitled to notice of an agency hearing shall be timely informed of...the matters of fact and law asserted." 5 U.S.C. 554(b).

To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). "Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense." *KenMor Electric Co. Inc.*, 355 NLRB 1024, 1029 (2010) *enf. denied sub nom. Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543 (5th Cir. 2013.)

The RD erred in finding that Easter Seals effectively waived its due process objection by signing a stipulated election agreement. Courts consider certain constitutional rights to be so fundamental that they will require heightened judicial scrutiny before allowing a right to be relinquished. *See e.g. Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292, 307 (1937) (presumption against waiver of a constitutional right). Courts apply a voluntary, knowing and intelligent standard to the waiver of a constitutional right. *See eg. Doe v. Marsh*, 105 F.3d 106

(2d Cir. 1997); *Lake James Comty. Volunteer Fire Dep't v. Burke County*, 149 F.3d 277 (4th Cir. 1998); *Gonzalez v. City of Hidalgo*, 489 F.2d 1043 (5th Cir. 1973). The RD statement that Easter Seals effectively waived an objection on due process grounds by entering into a stipulated election agreement strains credulity. Decision at 8. Easter Seals' certainly did not intend to waive its right to due process voluntarily, knowingly and intelligently by signing a stipulated election agreement.

The RD furthered erred in finding that the rules were immune from challenge *as applied* in this case. While the RD might be correct in stating that the facial validity of the rules is settled, the truncated time frame effectuated by the new rules in conjunction with the Union having the Excelsior list of ahead of time put both Easter Seals and its employees at a distinct disadvantage. The RD also deprived Easter Seals of due process by his perfunctory investigation and disregard of Easter Seals' Offer of Proof.

As forecasted by the Board's Members who dissented from the implementation of the Revised Election Rules (*see* 79 Fed. Reg. at 74,431), the Revised Rules have resulted in a "quickie election" process (*see e.g.*, Memorandum GC 16-02), whereby employers have no meaningful opportunity to exercise their rights under Section 8(c) of the Act and employees are rushed into decision-making on a question that is of key importance in their working lives. The Board's truncated election process coupled with the IBEW's intentional violation of the Board Rules unfairly tipped the scales of the election in the IBEW's favor in this case.

E. THE RD ERRED BY IGNORING THE IBEW'S SOLICITATION OF EASTER SEALS SUPERVISORS TO SUPPORT THE UNION

The RD erred when he ignored the IBEW's objectionable conduct in soliciting at least two Easter Seals supervisors to support the Union in the representation election. It is well established that pro-union supervisors can influence and threaten the free and fair choice crucial

to an election in subtle ways, without resorting to outright threats or extortion. As the Board stated in *Harborside*, “[e]vidence of actual threats is not required, implied threats of retaliation are sufficient.” *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004) slip op. at 3 (quoting *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1462 (1986)). Further, the Board has now consistently held that, “the party challenging the election need not introduce proof of actual coercion.” *Id.* (quoting *Evergreen Healthcare*, 104 F.3d 867, 874 (1997)). Whenever a supervisor engages in pro-union conduct, directed at the Associates he or she supervises, there is a danger that he or she will put pressure on those Associates, who are unlikely to forget the power the supervisor has over their work life. *Id.*

Easter Seals offered direct evidence in the form of a letter to two supervisors soliciting their support in the election. The RD’s Decision to ignore these letters and the IBEW’s actions in contacting these supervisors was error.

**F. THE RD IGNORED THE IBEW’S
UNLAWFUL PROMISE TO VOTERS**

The RD erred as a matter of law when he ignored the evidence of the IBEW’s unlawful promise to indeterminately reduce dues and materially misrepresented Easter Seals statements in an IBEW distributed flyer titled “Know the Truth About Union Dues.” The statement on the flyer is quoted in relevant part as follows:

The truth about Union dues is that the company is **"LYING"** to their employees about them. The company knows they can put fear into their employees by inflating and exaggerating the dollar amount by saying each of you will pay \$70, \$80 or even \$100 a week in Union dues. The Union knows that with the pay being what it is at Easter Seals/FedCap the dues structure needs to be adjusted to accommodate each of you. Therefore, the IBEW Local 86 is willing to give every employee in the bargaining unit at Easter Seals/Fedcap a **"GUARANTEE"** that your Union dues will be 1% of your gross earnings each pay period, (every two weeks). For example; if you gross \$1,000.00 every two (2) weeks your Union dues would be \$ 10.00 every pay period, which breaking it down even further would equal out to be \$5.00 every week. The Union further agrees that with this **"DUES"**

GUARANTEE", there will be **NO** initiation fee for the membership that are present to ratify this first time contract, anyone hired after this ratification would be subject to an initiation fee. You will not start paying any dues until a contract has been negotiated, ratified and approved by you the membership. Now I think you can clearly see how the company is **"LYING"** to you about Union dues. The question you have to ask is, **"WHAT ELSE WILL THE COMPANY LIE ABOUT?"** (emphasis in original)

The IBEW posted the dues increase on its website. The Union's attempt to buy votes by misrepresenting the truth and contradicting its own dues statement is objectionable. The RD ignored the IBEW's notification to its membership of an international dues increase and discounted the IBEW's unlawful promise directly contradicting the statement on its website advising members that the Union had approved a dues increase pursuant to its Constitution effective January 1, 2018. The dues statement on the IBEW's website was as follows:

2018 International Dues Increase

The Delegates of the 39th I.B.E.W. International Convention, which was conducted in St. Louis, Missouri during the week of September 19th through September 23rd, 2016, approved several amendments to Article IX of the *I.B.E.W. Constitution*. Accordingly, effective January 1, 2018, there will be an increase of one dollar (\$1.00) for the I.B.E.W. per capita, which applies to all members. **This will increase your 2018 Dues to \$42.50 monthly or \$127.50 quarterly or \$510.00 yearly.** (emphasis in original)

For more information contact us at (585) 235-1510. <http://ibewlu86.org/>

It is well established that a union's pre-election promise to extend voters benefits as a campaign tactic is grounds for overturning an election. As the Court held in *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999):

Just as the Act prohibits an employer from using threats or rewards as campaign tactics, it bars both crude and subtle forms of *vote-buying* on the part of the union. For example, a union is prohibited not only from blatantly giving an employee anything of value in exchange for his support,...but also from unconditionally providing a benefit in a way that tacitly obliges the employee to vote for it... Applying the latter rule, the Board has held that a union may not give voters anything of "tangible economic benefit" during the critical period before an election.

Id. at 931-32. The *Freund* decision held that a union's sponsorship of an employee's lawsuit against an employer for overtime pay "clearly violated the rule against providing gratuities to voters in the critical period before a representation election." *Freund*, 165 F.3d at 935.

In *King Elec., Inc. v. NLRB*, 440 F.3d 471 (D.C. Cir. 2006), the Court held that: As we have indicated, a Union's grant to employees of a benefit to which they are not otherwise entitled, during an election campaign, is still objectionable – perhaps a violation of the Act – whether or not conditioned on how employees vote in an election.

440 F.3d at 475 (footnote omitted). In *King Elec.*, the Court found that the offer of direct entry into an apprentice program without requiring employees to go through the selection procedure was objectionable conduct sufficient to set aside the election. The Court examined whether the union's use of an exception to its normal rules was in the normal course, or whether it was merely something that was in the union's discretion to offer in appropriate circumstances, perhaps to encourage pro-union votes. 440 F.3d at 476. The Court held that in the absence of a finding that the waiver procedure was binding on the union and thus unconditionally available to employees, the use of it was objectionable. *Id.*

Here, the Union's promise directly contradicted both its website announcement of a 2018 dues increase and the procedures in its Constitution for amending its dues structure. This deviation from its normal rules and procedures was a blatant attempt to buy voters, constitutes a promise to buy votes and is thus objectionable conduct.

The Union's material misrepresentation on its website also warrants overturning the election. In *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, (1982) the Board evaluated whether campaign literature unlawfully interfered with the employees' free choice in a representation election under the following test:

[W]e will no longer probe into the truth or falsity of the parties' campaign statements, and...we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has

used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.

The Sixth Circuit carved out a narrow exception to *Midland National*, in cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth, and where their right to a free and fair choice will be affected. *NLRB v. St. Francis Healthcare Centre*, 212 F3d 945 (6th Cir 2000). We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made. As such, the Board should apply that exception here.

The Union posted its dues structure on its website, which set out a recent dues increase without exception. The Union's subsequent letter to Easter Seals' employees seeking to disavow its own statement on its own website – all while calling Easter Seals a liar - is so deceptive that it warrants the Board's review.

CONCLUSION

For all of the reasons set forth above, compelling reasons exist for granting Easter Seal's Request for Review and Staying the Certification pending review. Accordingly, Easter Seals respectfully requests that the Board grant its Request for a Stay pending review of the Decision.

Dated: New York, New York
March 12, 2018

Respectfully Submitted,

EPSTEIN BECKER & GREEN, P.C.

By: 

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CERTIFICATE OF SERVICE

I, Donald S. Krueger, certify that I caused a copy of Employer's Request for Review of the Regional Director's Supplemental Decision Regarding Objections to Election and Certification of Representation in Case No. 03-RC-212875 to be filed with the Board by e-filing at www.nlr.gov and upon the Regional Director for Region 3 and upon the IBEW, Local 86 by electronic mail at the following address:

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Dated: New York, New York
March 12, 2018

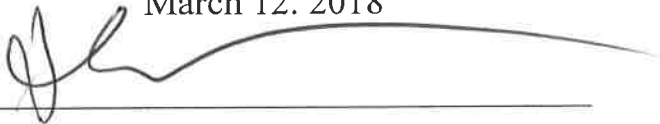


EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

EASTER SEALS NEW YORK

Employer

and

Case 03-RC-212875

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 86

Petitioner

**REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION REGARDING
OBJECTIONS TO ELECTION AND CERTIFICATION OF
REPRESENTATIVE**

Pursuant to a petition filed by the International Brotherhood of Electrical Workers, Local 86 (Petitioner) on January 11, 2018,¹ and a Stipulated Election Agreement approved by the Regional Director on January 18, an election was conducted on Wednesday, February 7, in a unit of the Employer's Direct Care Associates, Senior Support Specialists, and Teachers Aides/Direct Care Associates. The tally of ballots showed that of the approximately 57 eligible voters, 24 cast ballots for the Petitioner and 13 cast ballots against representation. There were no challenged ballots. Therefore, the Petitioner received a majority of the votes.

On February 14, the Employer timely filed seven objections. For the reasons discussed below, I find that none of the Employer's objections raise material and substantial issues of fact or law that would necessitate a hearing or require that the results of the election be set aside. I therefore overrule the Employer's objections in their entirety.

Accordingly, I am issuing a Certification of Representative.

I. THE LEGAL STANDARD

It is well established that "[r]epresentation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). Indeed, "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, supra, 941 F.2d at 328. Therefore, "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Kux Mfg. Co. v. NLRB*, 890 F.2d 804-808 (6th Cir. 1989). "The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit."

¹ All dates hereinafter are in 2018 unless otherwise indicated.

letter is that the Petitioner received this information from a voluntarily submitted union authorization card, not from an ill-gotten voter list. More importantly, the employees' receipt of this letter does not establish that the Petitioner utilized last year's voter list for contact information.

Moreover, the Employer's proffered evidence is that two individuals who were not eligible to vote in this election received campaign literature from the Petitioner. The Employer offered no evidence demonstrating that similar communications were sent to eligible voters during this time frame. Thus, the Employer's offer of proof is insufficient insofar as it fails to demonstrate that employees in the voting unit were affected by this conduct, a requirement in determining that a party engaged in objectionable conduct. See, e.g., *Avante at Boca Raton*, supra; and *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092 (1999). For this reason alone, the Employer's objection is without merit.

However, even assuming the Employer's claims that the Petitioner used the voter list in Case 03-RC-190611 to contact eligible voters in the instant case, it has not demonstrated that these actions constitute "misuse" of a voter list as contemplated by the Board in the Final Rule. The Employer has presented no evidence that the Petitioner utilized this list as an aid to harass, coerce, or rob any person appearing on this list. Indeed, the Employer's contentions, if true, amount to a union using a voter list to contact potential voters about an upcoming election. The Petitioner's alleged use of the voter list from Case 03-RC-190611 is therefore not inconsistent with the Board's intended use of voter lists in representation proceedings. Thus, I conclude that the Petitioner's alleged use of a voter list from a prior case does not constitute "misuse" under Sec. 102.62(d).

Moreover, even assuming that the Petitioner's alleged use of the voter list from Case 03-RC-190611 to contact prospective voters prior to this election constituted "misuse" under Sec. 102.62(d), it does not automatically follow, as the Employer seems to assume, that misuse of a voter list requires that the results of an election be set aside. The Board specifically addressed and rejected such a contention in its comments accompanying the Final Rule. To wit:

[T]he Board has concluded that it would not be appropriate at this time to specify a remedy, or set of remedies, that would be applicable in all situations...we will leave the question of remedies to a case-by-case adjudication...

[T]he Board rejects the notion advanced in some comments that misuse of the voter list should always warrant setting aside the results of an election won by the party misusing the list...[T]he purpose of the election is to answer the question of representation...[T]here is a strong presumption that ballots cast in a secret ballot election reflect the true desires of the participating employees. Accordingly, the burden is on the objecting party to demonstrate that the election results "did not accurately reflect the unimpeded choice of the employees." *Daylight Grocery Co., Inc. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982). A party seeking to overturn the outcome of an election based on another party's conduct has the burden of showing not only that the conduct complained of occurred, but also that it "interfered with the employees' exercise of free choice to the extent that it

materially affected the [results of the] election.” *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988)...

But not every misuse of the list can be said to have interfered with employee free choice in the election, let alone be said to have materially affected the results of the election.

Fed Reg. 79 at 74359.

In the instant case, not only has the Employer failed to demonstrate that the Petitioner engaged in misuse of the voter list, the Employer has also failed to show that such conduct, if it occurred, would require the results of the election to be set aside. As noted above, the “misuse” contended by the Employer had the practical effect of potential voters being contacted about representation by the Petitioner a mere five days prior than the due date for the voter list in the current case. It is difficult to conceive how the employees’ receipt of this letter interfered with their exercise of free choice or materially affected the election, and the Employer has not explained why one letter, containing no impermissible information, sent after a petition was filed to individuals who were potentially eligible to vote, requires an election in which the Petitioner prevailed by a margin of 24-13 be set aside.³

For the above reasons, I find that Objection 1 is without merit and is hereby overruled.

OBJECTION 2: The IBEW engaged in conduct affecting the necessary laboratory conditions required to ensure the free exercise of voter choice by conducting its campaign through ESNY supervisors, including House Managers who were former Senior Direct Support Specialists, to campaign in favor of union representation during the organization campaign.

Regarding Objection 2, the Employer’s proffered evidence consists of two supervisors who could testify that they were solicited by the Petitioner to engage in pro-union conduct. The Employer also makes a vague assertion that the two supervisors would testify about conduct engaged in by other supervisors. However, the Employer’s offer of proof does not identify the supervisors who allegedly engaged in campaign activity, nor in what activity the unidentified supervisors engaged.

Sec. 102.66(c) of the Board’s Rules and Regulations describes an offer of proof as “a written statement...identifying each witness the party would call to testify concerning the issue and summarizing each witness’s testimony.” Here, the Employer’s failure to identify the specific conduct in which supervisors engaged, nor even the names of the supervisors who engaged in such conduct, is a fatal flaw in its objection. The Board, in *Allen Tyler & Son*, 234 NLRB 212, 212 (1978), refused to require a Regional Director to investigate objections based on “a suspicious set of circumstances.” Rather, an objecting party must “furnish sufficient evidence to

³ The Employer contends that the Petitioner’s alleged misuse of the voter list from Case 03-RC-190611 “conveys a message to eligible voters that the [Petitioner] has access to employees’ confidential information and they are willing to use and share that information.” However, what the Employer fails to note is that, even assuming its contentions regarding the Petitioner’s use of an earlier voter list were correct, that the Petitioner received a voter list from the Employer no later than January 20 with the same information contained therein.

provide a *prima facie* case in support of its objections..." *Aurora Steel Products*, 240 NLRB 46, 46 fn. 3 (1979).

In this case, the Employer has identified two witnesses who would testify that they were "solicited" to engage in pro-union campaigning. However, the Employer's offer does not contend that these supervisors engaged in pro-union campaigning themselves, nor does it satisfactorily identify the supervisors who allegedly engaged in pro-union activity or the activity in which these supervisors engaged. Thus, the Employer has not met its burden of presenting a *prima facie* case in support of this objection.⁴ I therefore am overruling Objection 2.

OBJECTION 3: The IBEW engaged in conduct affecting the necessary laboratory conditions required to ensure the free exercise of voter choice by unlawfully promising voters that it would reduce a dues increase it recently publicized on its website.

In support of this objection, the Employer submitted a January 25 letter⁵ in which the Petitioner stated that employees' dues would be calculated as 1% of employees' gross earnings, to be calculated on a biweekly basis. The Employer also provided a screenshot nominally taken from the Petitioner's website. This screenshot was an announcement that dues for IBEW members would increase by \$1.00 per hour beginning on January 1. The Employer claims that the Petitioner's letter in which it caps dues deductions at 1% of employees' wages contravenes the posting on the Petitioner's website, and thus constituted an unlawful promise of benefit.⁶

Even if the Employer's production of this letter and the screenshot from the Petitioner's website are true and accurate, they do not establish that the Union's commitment to employees was objectionable. The Board's decision in *EFCO Corp.*, 185 NLRB 220 (1970), is instructive in this regard. In *Efco*, the involved union was seeking to avoid having the union security clause rendered invalid via a deauthorization vote. That union promised employees that it would reduce the dues level in the event the union prevailed. The Board found that this promise to employees was not objectionable. In so doing, the Board stated the following:

The logic of *Dit-Mco*, [163 NLRB 1019 (1967), *affd.* 428 F.2d 775 (C.A. 8)] is that waiver by a Union of a financial obligation – such as initiation fees – which could be avoided entirely by voting "no" does not coerce employees into voting "yes." Here, as in *Dit-Mco*, unit employees could have avoided entirely the mandatory requirement to pay membership dues if a majority had voted in favor of deauthorizing the Union. The announcement of the dues reduction in no way affected the availability of the option to vote in favor of deauthorization...

The announced alteration in the dues structure was clearly designed to ensure the employees' continued support in the forthcoming election. In *Primco [Primco Casting Corp.]*, 174 NLRB 244 (1969)], we pointed out that an otherwise

⁴ The Employer's contention in its offer of proof, that two supervisors were "solicited" to engage in pro-union conduct, was not included in its objection and I am not required to directly address it. I note, however, that mere solicitation of a supervisor on behalf of a union, without more, does not constitute objectionable conduct.

⁵ The contents of this letter also serve as the basis for Objection 4, which is discussed below.

⁶ In support of its position, the Employer relies on *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999); and *King Elec., Inc. v. NLRB*, 440 F.3d 471 (D.C. Cir. 2006).

permissible change in a union's position, made in response to legitimate employee demands, cannot be condemned simply because it is motivated by the union's desire to present itself as a more attractive candidate.

185 NLRB at 221. The same logic is true in the instant case. Even assuming that the Petitioner reduced the amount of dues which would eventually be required of members, such conduct is not objectionable. The Employer's focus on a screenshot from the Petitioner's website is misplaced. As none of the unit employees are currently required to pay dues, this posting is largely inapplicable to them, particularly given the Petitioner's direct communication to employees regarding the calculation of their dues.

The cases cited by the Employer in support of its position are easily distinguishable. Both involve a tangible benefit provided directly to prospective voters. For instance, in *Freund*, the union involved had sponsored employees' lawsuits against their employer for failure to pay overtime wages. Similarly, in *King Elec.*, the involved union promised employees they would receive automatic entry to its apprenticeship program if at least 51% of those voters signed authorization cards.⁷ In the instant matter, the Petitioner's "promise" is the cost of dues that employees would pay upon ratification of an initial collective-bargaining agreement. Employees could easily elect not to pay any dues by voting against the Petitioner in this election. Thus, as was the case in *EFCO*, the Petitioner's establishment of a 1% dues deduction rate is not objectionable.

I therefore conclude that Objection 3 is without merit and hereby overrule it.

OBJECTION 4: The IBEW engaged in conduct affecting the necessary laboratory conditions required to ensure the free exercise of voter choice by materially misrepresenting and providing false and misleading information to voters that ESNY had lied about the dues that IBEW publicized on its website.

This objection, as with Objection 3, relates to the Petitioner's January 25 letter. The Employer contends that this letter "materially misrepresented" the Employer's statements with respect to the Petitioner's own statements regarding dues increases. However, the Employer failed to identify which statements made by the Petitioner in its January 25 letter were material misrepresentations complained of in the Employer's objections. Thus, the Employer's offer of proof in this regard relies on the type of "bare allegations" found by the Board in *The Daily Grind*⁸ to be insufficient to require an evidentiary hearing.

Additionally, even was I to conclude that the Employer's proffer was sufficient to support its objection, the conduct alleged in the objection would not require that the election results be set aside. In *Midland National Life Insurance Co*, 263 NLRB 127 (1982), the Board held the following:

⁷ The instant case is also distinguishable from the Supreme Court's decision in *NLRB v. Savair*, 414 U.S. 270 (1973). In *Savair*, the Court found it unlawful for a union to condition the waiver of initiation fees on employees' written support of the union. In the instant case, the Petitioner set no conditions on its offer, other than establishing that employees would not begin paying dues until after a first contract was negotiated.

⁸ 337 NLRB 655, 656 (2002).

[W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.

263 NLRB at 133 (footnotes omitted). Thus, assuming the Petitioner's statements in its January 25 letter to employees were misrepresentations, as the Employer contends, these statements are not objectionable and do not require that the results of the election be set aside.

For these reasons, I overrule Objection 4.

OBJECTION 5: The Regional Director prepared and issued initial Notices of Election that NLRB Rules compelled ESNY to post and that improperly identified the employees that were eligible to vote in the election.

I initially note that although the Employer refers to "initial Notices of Election," I interpret this statement to refer to the Notice of Petition for Election, a form distributed to an employer upon the filing of a petition for representation. Sec. 102.63(a)(2) of the Board's Rules and Regulations requires that an employer post this notice within two business days of receiving the Notice of Hearing. This Notice of Petition for Election included the description of the bargaining unit as set forth in the petition but also advised employees that no final decision had been made regarding the appropriateness of the petitioned-for bargaining unit and whether an election would be conducted. The Employer's objection implies, without stating, that the Notice of Petition for Election's identification of the petitioned-for bargaining unit caused confusion because the job titles used to describe the appropriate unit in the parties' Stipulated Election Agreement were slightly different.

The Employer does not argue that the Notice of Petition for Election in the instant matter failed to contain the information required by Sec. 102.63(a)(2), or that it did not accurately set forth the petitioned-for bargaining unit. Indeed, the Employer's contention is limited to its assertion that the Notice of Petition for Election included the petitioned-for unit. The Employer contends that it therefore "excluded certain employees who were eligible to vote," and caused confusion among voters. However, the Employer proffered no evidence to support its contentions regarding this alleged confusion for eligible voters and ignores that the Notice of Election in this matter accurately set forth the appropriate bargaining unit to which the parties agreed. As noted above, such bare assertions, without more, are insufficient to support the Employer's objections.

More substantively, the Employer signed a Stipulated Election Agreement ("Agreement") in this matter. Item 1 of the Agreement unambiguously states, inter alia, that "the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations." The Employer has presented no evidence that the Notice of Petition for Election failed to comport with Sec. 102.63(a)(2). In the Agreement, the Employer agreed to be bound by the Board's Rules

and Regulations, and has presented no evidence that the Region failed to follow the Rules and Regulations in conducting this election.

For these reasons, I overrule Objection 5.

OBJECTION 6: The Board engaged in objectionable conduct by promulgating and enforcing rules and regulations governing representation elections that violate employers' due process rights.

The Employer contends that the Final Rule violates the Employer's due process rights under the Administrative Procedures Act, the National Labor Relations Act, and the Constitution. Initially I note, as I did with Objection 5 above, that the Employer effectively waived any such objection when it entered into the Agreement.

Additionally, the facial legality of the Final Rule has already been addressed in several judicial arenas, and the matter is, by now, well settled. As the Board stated in *University of Southern California*, 365 NLRB No. 11, slip op at 1 fn. 1 (2016):

[W]e note that in *Chamber of Commerce v. NLRB*, 118 F.Supp.3d 171 (D.D.C. 2015), the district court, granting summary judgment for the Board, found that the Rule did not violate the Act, the First Amendment, or due process under the Fifth Amendment. We further note that in *Associated Builders & Contractors of Texas v. NLRB*, No. 1-15-CB-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015), the district court found that the Rule did not violate the Act and was not arbitrary and capricious under the Administrative Procedures Act. That decision was affirmed by the U.S. Court of Appeals for the Fifth Circuit, 826 F.3d 215 (5th Cir. 2016).

I further note that the Board, in *UPS Ground Freight, Inc.*, 361 NLRB No. 113 (July 27, 2017) asserted that "[t]he rule is not susceptible to alteration in an individual adjudication." *Id.*, slip op. at 1 fn. 1. The Employer's argument is therefore without legitimate basis.

Objection 6 is hereby overruled.

OBJECTION 7: By the foregoing, and other acts, the IBEW, its agents and representatives have engaged in conduct affecting the holding of a free and fair election on February 7, 2018. ESNY respectfully requests that the results of the election be set aside and that other appropriate relief be granted.

The Employer failed to present any evidence in support of this objection that has not already been considered in connection with the above-discussed objections. I therefore overrule this catch-all objection.

III. CONCLUSION

Based on the above, I overrule each of the Employer's objections, and I shall certify the Petitioner as the representative of the appropriate bargaining unit.

IV. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for the International Brotherhood of Electrical Workers, Local 86, and that it is the exclusive representative of all the employees in the following bargaining unit:

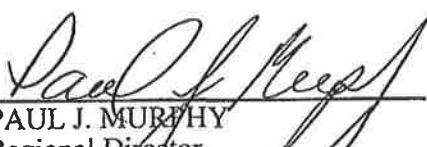
All full-time and regular part-time Direct Care Associates, Senior Support Specialists, and Teachers Aides/Direct Care Associates employed by the Employer at ICF residences designated A, B and C at the Kessler Center Campus, excluding office clerical employees, managers, guards, professional employees and supervisors as defined in the Act, and all other employees.

V. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **Monday, March 12, 2018**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: February 26, 2018


PAUL J. MURPHY
Regional Director
National Labor Relations Board
130 S Elmwood Ave Ste. 630
Buffalo, NY 14202-2465

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

EASTER SEALS NEW YORK

Employer

and

Case 03-RC-212875

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 86**

Petitioner

**AFFIDAVIT OF SERVICE OF Regional Director's Supplemental Decision regarding
Objections to Election and Certification of Representative**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on February 26, 2018, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Donald S. Krueger , Senior Counsel
Epstein, Becker & Green, P.C.
250 Park Ave
New York, NY 10177-1211

Donald J. Harreld
402 Rogers Pkwy
Rochester, NY 14617-4738

Bruce H. Beal , Organizer
International Brotherhood of Electrical
Workers Local 86
2300 E River Rd
Rochester, NY 14623-1099

February 26, 2018

Date

Viola Mathis, Designated Agent of NLRB

Name

/s/ Viola Mathis

Signature

EXHIBIT B

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No. 03-RC-212875	Date Filed 1/11/2018
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INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer Easter Seals/FedCap Kessler Center		2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 402 Rogers Pkwy NY Rochester 14617-4738	
3a. Employer Representative - Name and Title Aron Myers		3b. Address (If same as 2b - state same)	
3c. Tel. No. (585) 957-7158	3d. Cell No.	3e. Fax No. (585) 266-8518	3f. E-Mail Address AMyers@fedcap.org
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Others		4b. Principal product or service Housing & Educating Autistic people	5a. City and State where unit is located: Rochester, NY

5b. Description of Unit Involved		6a. No. of Employees in Unit: 42
Included: See Attached Page 2 for additional details		6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
Excluded: See Attached Page 2 for additional details		

Check One: ☐ 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) (If no reply received, so state).
☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).		8b. Address	
8c. Tel No.	8d. Cell No.	8e. Fax No.	8f. E-Mail Address
8g. Affiliation, if any		8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No _____ If so, approximately how many employees are participating? _____
 (Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11b. Election Date(s): February 05, 2018	11c. Election Time(s): 6:00 a.m. - 8:00 a.m. and 1:00 p.m. -3:30 p.m.	11d. Election Location(s): In the Work Based Learning Room (Next to the Art Room) In the baseme
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12a. Full Name of Petitioner (including local name and number) Bruce H. Beal International Brotherhood of Electrical Workers Local 86	12b. Address (street and number, city, state, and ZIP code) 2300 E River Rd NY Rochester 14623-1099
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12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
International Brotherhood of Electrical Workers Local 86

12d. Tel No. (585) 727-0296	12e. Cell No. (585) 727-0296	12f. Fax No. (585) 235-0420	12g. E-Mail Address bbeal@ibewlu86.com
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13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title		13b. Address (street and number, city, state, and ZIP code)	
13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Bruce H. Beal	Signature Bruce H. Beal	Title Organizer	Date 01/11/2018 11:45:14
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WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment

DO NOT WRITE IN THIS SPACE	
Case 03-RC-212875	Date Filed 1/11/2018

Employees Included

All Senior Direct Care Associate (Sr. DCA) Direct Care Associate (DCA) and Teacher Assistants (TA's)

Employees Excluded

All Office staff, management, Security Guards and Maintenance workers

EXHIBIT C

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

Easter Seals New York

Case 03-RC-212875

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The Employer, a New York not-for-profit corporation with its principal offices located at 633 Third Avenue, New York, NY 10017 and a facility located at the Kessler Center Campus located at 402 Rogers Parkway, Rochester, NY 14617, is engaged in the operation of a social service organization providing residential and educational services to individuals with disabilities and special needs. Annually, the Employer derives gross revenues in excess of \$250,000, and purchases and receives goods valued in excess of \$5,000, which goods are shipped directly to the Employer's Rochester, New York facility from points outside of New York State.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

DATE: Wednesday February 7, 2018 **HOURS:** 6:00 AM – 8:00 AM and
1:00 PM – 3:30 PM

PLACE: The Work-Based Learning Room in the basement of the Kessler School located at the Employer's Rochester, New York facility.

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Direct Care Associates, Senior Support Specialists, and Teachers Aides/Direct Care Associates employed by the Employer at ICF residences designated A, B and C at the Kessler Center Campus.

Excluded: Office clerical employees, managers, guards, professional employees and supervisors as defined in the Act, and all other employees.

Initials: _____

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending January 5, 2018**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls or by mail as described above in paragraph 4.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers Local 86?" The choices on the ballot will be "Yes" or "No".

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

9. NOTICE OF ELECTION ONSITE REPRESENTATIVE. The following individual will serve as the Employer's designated Notice of Election onsite representative:

Name: Donald Harreld

Initials: _____

Address: 402 Rogers Parkway, Rochester, NY 14617

Phone Number: (917) 885-2779

Email Address: donharreld@eastersealsny.org

10. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

11. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

12. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

13. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

Easter Seals New York

(Employer)

**International Brotherhood of Electrical
Workers Local 86**

(Petitioner)

By /s/ Donald Krueger January 18, 2018
(Name) (Date)

By /s/ Bruce Beal January 18, 2018
(Name) (Date)

Recommended: /s/ Michael Dahlheimer January 18, 2018
Michael Dahlheimer, Field Examiner
(Date)

Date approved: January 18, 2018

/s/Paul J. Murphy (SLL)

Paul J. Murphy

Regional Director, Region 3

National Labor Relations Board

EXHIBIT D

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 3

EASTER SEALS NEW YORK,

And

Case No. 03-RC-212875

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 86,

**EASTER SEALS NEW YORK
OBJECTIONS TO CONDUCT OF ELECTION AND
CONDUCT AFFECTING THE RESULTS OF ELECTION**

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations and Statements of Procedure, Easter Seals New York ("ESNY") by its attorneys, Epstein Becker & Green, submits the following Objections to the Conduct of the Election and Conduct Affecting the Results of the conducted before the Board in the above-captioned matter on February 7, 2018.

1. The International Brotherhood of Electrical Workers, Local 86 its officers, directors, agents and employees ("IBEW") engaged in conduct affecting the necessary laboratory conditions required to ensure the free exercise of voter choice by improperly using confidential employee contact information from a prior representation proceeding in Case No. 03-RC-190611 to contact voters before the voter eligibility list was served in this case

2. The IBEW engaged in conduct affecting the necessary laboratory conditions required to ensure the free exercise of voter choice by conducting its campaign through ESNY supervisors, including House Managers who were former

Senior Direct Support Specialists, to campaign in favor of union representation during the organization campaign.

3. The IBEW engaged in conduct affecting the necessary laboratory conditions required to ensure the free exercise of voter choice by unlawfully promising voters that it would reduce a dues increase it recently publicized on its website.

4. The IBEW engaged in conduct affecting the necessary laboratory conditions required to ensure the free exercise of voter choice by materially misrepresenting and providing false and misleading information to voters that ESNY had lied about the dues that IBEW publicized on its website.

5. The Regional Director prepared and issued initial Notices of Election that NLRB Rules compelled ESNY to post and that improperly identified the employees that were eligible to vote in the election.

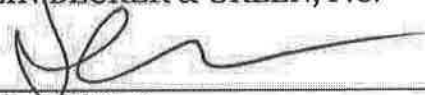
6. The Board engaged in objectionable conduct by promulgating and enforcing rules and regulations governing representation elections that violate employers' due process rights.

7. By the foregoing, and other acts, the IBEW, its agents and representatives have engaged in conduct affecting the holding of a free and fair election on February 7, 2018. ESNY respectfully requests that the results of the election be set aside and that other appropriate relief be granted.

Dated: New York, New York
February 14, 2018

EPSTEIN BECKER & GREEN, P.C.

By:


Donald S. Krueger, Esq.

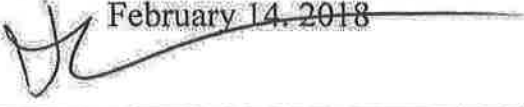
Attorneys for Easter Seals New York
250 Park Avenue
New York, New York 10177-1211
(212) 351-4500

CERTIFICATE OF SERVICE

I, Donald S. Krueger, certify that I caused a copy of Employer's Objections to Conduct of Election and Conduct Affecting the Results of the Election in Case No. 03-RC-212875 to be filed with Region 3 by e-filing at www.nlrb.gov upon the Petitioner IBEW, Local 86 by electronic mail at the following address:

Bruce H. Beal, Organizer
International Brotherhood of Electrical, Local 86
2300 East River Road
Rochester, NY 14623-1099
bbeal@ibewlu86.com

Dated: New York, New York
February 14, 2018



EPSTEIN
BECKER
GREEN

Attorneys at Law

Donald S. Krueger
t 212.351.4516
f 212.878.8600
dkrueger@ebglaw.com

February 14, 2018

Hon. Paul J. Murphy
Regional Director
National Labor Relations Board
Region 3
130 S. Elmwood Avenue
Suite 630
Buffalo, New York 14202-2465

Re: Easter Seals New York and IBEW Local 86
Case No. RC 03-RC-212875

Dear Mr. Murphy:

Pursuant to Sections 102.69 and 102.66(c) of the Board's Rules and Regulations, Easter Seals New York ("Easter Seals") submits this letter in support of its Objections to the Conduct of the Election and Objections to the Conduct Affecting the Results of the Election ("Objections") in the election held on February 7, 2018. Simultaneously with the filing of this letter, Easter Seals filed its Objections based on conduct by the Petitioner International Brotherhood of Electrical Workers, Local 86 ("IBEW"), which resulted in denying voters the opportunity to make a fair and informed decision. Copies of relevant documents in support of Easter Seals' Objections are attached as Exhibit "A."

The Board's responsibility to ensure that the necessary laboratory conditions are maintained for conducting a free and fair election is well established. *See General Shoe Corp.*, 77 NLRB 124, 127 (1948), *enfd* 192 F.2d 504 (1951) *cert. den.* 343 U.S. 904 (1952). The Board will not certify a representative labor organization unless the election results "unquestionably reflect the employees' intent." *Pacific Southwest Container, Inc.*, 283 NLRB 79, 80. As demonstrated below, the IBEW's objectionable conduct warrants overturning the results of the February 7, 2018 election.

Objections 1 and 2

The IBEW engaged in objectionable conduct when it improperly used a voter eligibility list from the 2017 election in Case No. 03-RC-190611 involving the Retail Wholesale and Department Store Union, UFCW in this election. Bruce Beal, the IBEW organizer in the current election, previously worked as the organizer for the Retail Workers in the 2017 Retail Workers election and had access to the voter eligibility list

from that election because it was served on him as the then petitioner's representative. The IBEW and its agents improperly used the confidential information from the 2017 voter eligibility list to contact Easter Seals employees prior to the filing of the petition and/or the service of the voter eligibility list in this election.

Section 102.67 of the NLRB Rules and Regulations specifically states that "[t]he parties *shall not* use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." Here, the IBEW was not a party to the prior proceedings and this is not a related matter. The Board stated in *Excelsior Underwear Inc.*, 156 NLRB 1236, 1244 (1966) that it reserved the right to provide remedies if voter contact information was misused. Such remedies may include setting aside election results, seeking injunctive relief or finding that misuse of the list constitutes an unfair labor practice. The General Counsel has stated that a party who decides to raise allegations of misuse of the voter list may do so by filing objections to the election or an unfair labor practice charge. Memorandum GC 15-06 (April 6, 2015).

The IBEW's use of employees' confidential contact information in contravention of clear Board rules and long standing precedent warrants overturning the election results. The Union's willingness to disregard Board rules and its improper use of confidential employee information conveys a message to eligible voters that the Union has access to employees' confidential information and they are willing to use and share that information. The IBEW's abuse of Board procedures and its blatant disregard for safeguarding confidential employee information is objectionable and warrants overturning the election.

The IBEW further engaged in objectionable conduct when it solicited at least two Easter Seals supervisors to support the Union in the representation election. It is well established that pro-union supervisors can influence and threaten the free and fair choice crucial to an election in subtle ways, without resorting to outright threats or extortion. As the Board stated in *Harborside*, "[e]vidence of actual threats is not required, implied threats of retaliation are sufficient." *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004) slip op. at 3 (quoting *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1462 (1986)). Further, the Board has now consistently held that, "the party challenging the election need not introduce proof of actual coercion." *Id.* (quoting *Evergreen Healthcare*, 104 F.3d 867, 874 (1997)). Whenever a supervisor engages in pro-union conduct, directed at the Associates he or she supervises, there is a danger that he or she will put pressure on those Associates, who are unlikely to forget the power the supervisor has over their work life. *Id.*

Objections 3 and 4

The IBEW engaged in objectionable conduct when it unlawfully promised employees benefits in the form of reduced dues and materially misrepresented Easter

Seals statements regarding the Union's own statements about dues increases in a flyer titled "Know the Truth About Union Dues." The statement in the flyer was as follows:

The truth about Union dues is that the company is "**LYING**" to their employees about them. The company knows they can put fear into their employees by inflating and exaggerating the dollar amount by saying each of you will pay \$70, \$80 or even \$100 a week in Union dues. The Union knows that with the pay being what it is at Easter Seals/FedCap the dues structure needs to be adjusted to accommodate each of you. Therefore, the IBEW Local 86 is willing to give every employee in the bargaining unit at Easter Seals/Fedcap a "**GUARANTEE**" that your Union dues will be 1% of your gross earnings each pay period, (every two weeks). For example; if you gross \$1,000.00 every two (2) weeks your Union dues would be \$ 10.00 every pay period, which breaking it down even further would equal out to be \$5.00 every week. The Union further agrees that with this "**DUES GUARANTEE**", there will be **NO** initiation fee for the membership that are present to ratify this first time contract, anyone hired after this ratification would be subject to an initiation fee. You will not start paying any dues until a contract has been negotiated, ratified and approved by you the membership. Now I think you can clearly see how the company is "**LYING**" to you about Union dues. The question you have to ask is, "**WHAT ELSE WILL THE COMPANY LIE ABOUT?**" (emphasis in original)

The IBEW's unlawful promise directly contradicted the statement on its website advising members that the Union had approved a dues increase pursuant to its Constitution effective January 1, 2018. The statement on the website was as follows:

2018 International Dues Increase

The Delegates of the 39th I.B.E.W. International Convention, which was conducted in St. Louis, Missouri during the week of September 19th through September 23rd, 2016, approved several amendments to Article IX of the *I.B.E.W. Constitution*. Accordingly, effective January 1, 2018, there will be an increase of one dollar (\$1.00) for the I.B.E.W. per capita, which applies to all members. **This will increase your 2018 Dues to \$42.50 monthly or \$127.50 quarterly or \$510.00 yearly.** (emphasis in original)

For more information contact us at (585) 235-1510.

It is well established that a union's pre-election promise to extend voters benefits as a campaign tactic is grounds for overturning an election. As the Court held in *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999):

Just as the Act prohibits an employer from using threats or rewards as campaign tactics, it bars both crude and subtle forms of *vote-buying* on the part of the union. For example, a union is prohibited not only from blatantly giving an employee anything of value in exchange for his support, ... but also from unconditionally providing a benefit in a way that tacitly obliges the employee to vote for it.... Applying the latter rule, the Board has held that a union may not give voters anything of "tangible economic benefit" during the critical period before an election.

Id. at 931-2. The *Freund* decision held that a union's sponsorship of an employee's lawsuit against an employer for overtime pay "clearly violated the rule against providing gratuities to voters in the critical period before a representation election." *Freund*, 165 F.3d at 935.

In *King Elec., Inc. v. NLRB*, 440 F.3d 471 (D.C. Cir. 2006), the United States Court of Appeals for the District of Columbia Circuit, held that:

As we have indicated, a Union's grant to employees of a benefit to which they are not otherwise entitled, during an election campaign, is still objectionable – perhaps a violation of the Act – whether or not conditioned on how employees vote in an election.

440 F.3d at 475 (footnote omitted). In *King Elec.*, the Court found that the offer of direct entry into an apprentice program without requiring employees to go through the selection procedure was objectionable conduct sufficient to set aside the election. The Court examined whether the union's use of an exception to its normal rules was in the normal course, or whether it was merely something that was in the union's discretion to offer in appropriate circumstances, perhaps to encourage pro-union votes. 440 F.3d at 476. The Court held that in the absence of a finding that the waiver procedure was binding on the union and thus unconditionally available to employees, the use of it was objectionable. *Id.*

Here, the Union's promise directly contradicted both its website announcement of a 2018 dues increase and the procedures in its Constitution for amending its dues structure. This deviation from its normal rules and procedures was a blatant attempt to buy voters and constitutes a promise to buy votes and is objectionable conduct.

Objections 5 and 6

Easter Seals urges that its rights to due process of law under the Administrative Procedures Act, the National Labor Relations Act and the Constitution are being violated as the revised rules are applied by the Board's refusal to provide it with adequate time to prepare for a hearing, consult with legal counsel and prepare for an election. *See European Imports, Inc.*, 365 NLRB No. 41 (2017) (Acting Chairman Miscimarra's Dissent).

The fundamental elements of procedural due process are notice and an opportunity to be heard. *The Earthgrains Co.*, 351 NLRB 733, 735 (2007); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 396, 313 (1950). Congress incorporated these fundamental notions of due process into the Administrative Procedures Act which states, "persons entitled to notice of an agency hearing shall be timely informed of...the matters of fact and law asserted." 5 U.S.C. 554(b).

To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). "Due process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense." *KenMor Electric Co. Inc.*, 355 NLRB 1024, 1029 (2010) *enf. denied sub nom. Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543 (5th Cir. 2013.)

Similarly, the Board's rules requiring Easter Seals to post an initial Notice concerning the election which excluded certain employees who were eligible to vote confused voters, disadvantaged Easter Seals and warrants a new election.

Evidence Supporting Objections

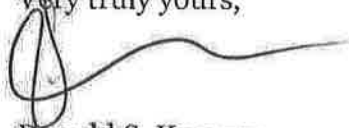
In support of its Objections, Easter Seals submits and relies upon the voter eligibility list from this election, which does not include Mr. Kelvin Reaves or Mr. Jentavious Sampson, who are both currently Resident Managers; a redacted voter eligibility list from the 2017 election in NLRB Case No. 03-RC-190611, which included Mr. Reaves' and Mr. Sampson's names and addresses because they were eligible to vote in that election as Senior Direct Support Specialists; and a letter and envelope from the IBEW to Mr. Kelvin Reaves regarding the election at issue here. The 2017 voter eligibility list was served on Mr. Bruce Beal, the union organizer for the Retail

Hon. Paul J. Murphy
February 14, 2018
Page 6

Workers Union, who is now the IBEW organizer. Mr. Reaves and Mr. Sampson, Resident Managers, can both testify that they did not sign union authorization cards or supply the Union with their home address or personal contact information; that the Union nevertheless sent correspondence to them during the election period while they were employed as supervisors at Easter Seals; and about the conduct of other supervisors during the election. Easter Seals also submits the "Know the Truth About Union Dues" pamphlet distributed to employees by the IBEW; a print out from the IBEW Local 86 page web site at <http://ibewlu86.org/> regarding the 2018 dues increase; and the NLRB Notice of Election.

Based upon the foregoing, Easter Seals submits that its Objections to the February 7, 2018 election should be sustained and the results of the elections should be set aside. If you need any additional information for your investigation, please let me know and we will be pleased to provide additional information.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Donald S. Krueger', with a long horizontal flourish extending to the right.

Donald S. Krueger

EXHIBIT A

Redacted

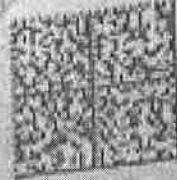
Voter List- Case No. 03-RC-190611- Easter Seals New York

Full Employee Name (Last, First)	Work Location	Shift*	Job Classification	Home Address	Employee Preferred Phone #1	Employee Preferred Phone #2	Personal E-Mail
	School						
Reaves, Kelvin	ICF-A	10AM-8PM	Sr Direct Support Specialist			none listed	
Sampson, Jentavious	ICF-B	10AM-8PM	Sr Direct Support Specialist			none listed	



International Brotherhood of
Electrical Workers
Local Union #86
2300 E. River Road
Rochester, NY 14623

ROCHESTER
NY 14623
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FACE IT ANYWAY
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Kelvin Reeves



14615-146543

http://www.ibeaworkers.org



INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Local 86
2300 E. River Road
Rochester, N.Y. 14623
Tel: (585) 235-1510
Fax: (585) 235-0420

DAVID A. YOUNG, JR., Business Manager
DANIEL P. O'MEALIA, President
JOHN V. HAUCK, Financial Secretary

Dear Sisters and Brothers,

January 15, 2018

Congratulations!

Thank you for taking the first step in "Organizing" your work place. You have made a big decision, not only for you, but for your future and above all your family. Thank you for signing a "Union Authorization Card" for the IBEW Local 86. All information is strictly confidential. Several Easter Seals/FedCap employees have reached out to me at the IBEW asking for help with the many problems you are facing at your work place. The IBEW Local 86 has been meeting with numerous employees from Easter Seals/FedCap and we are aware of the many complaints expressed by the employees. Therefore, as of Thursday, January 11th the IBEW Local 86 filed a petition for an NLRB secret ballot election on behalf of all the card signers at the Easter Seals/FedCap Kessler Center. We are currently just waiting on the company to give a stipulation agreement to the NLRB and the Union.

The Easter Seals/FedCap employees deserve to be treated with dignity and respect. The IBEW Local 86 will represent you and your co-workers against work place injustices, harassment, unsafe working conditions and constant changing of your schedules along with other problems you may be facing on the job. Your concerns are now our fight. The IBEW currently represent over 650,000 members across the United States and Canada and with your help and support, we will negotiate a fair contract for you just as we have for all of them. You and your co-workers will finally have a voice on the job, along with Union representation.

We strongly encourage you and your co-workers to attend "ALL" IBEW Local 86 Union meetings. We will be providing you with valuable information on the organizing campaign and election, as well as answering any questions you may have about the Union or the company. If you have any questions feel free to contact Organizer; Bruce Beal at 585-727-0296.

In Solidarity,

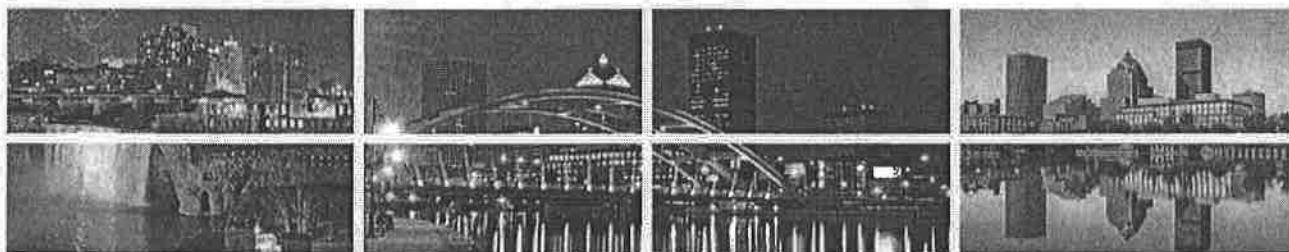
Bruce Beal
Organizer
IBEW Local 86
President Finger Lakes AFL-CIO, Central Labor Council

Quality and Pride since 1899
Affiliated with:
AFL-CIO • N.Y. State AFL-CIO • Rochester Labor Council AFL-CIO
N.Y. State Electrical Workers Association • N.Y. State Building Trades Council



INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

LOCAL 86 • ROCHESTER, NY



2018 International Dues Increase

The Delegates of the 39th I.B.E.W. International Convention, which was conducted in St. Louis, Missouri during the week of September 19th through September 23rd, 2016, approved several amendments to Article IX of the *I.B.E.W. Constitution*. Accordingly, effective January 1, 2018, there will be an increase of one dollar (\$1.00) for the I.B.E.W. per capita, which applies to all members. **This will increase your 2018 Dues to \$42.50 monthly or \$127.50 quarterly or \$510.00 yearly.**

For more information contact us at (585) 235-1510.

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- Business Manager's Desk
- Fund Office
- Interesting Reading
- Links
- Online Forms
- Organizer's Corner
- Political Action
- Press Corner
- Referral procedure
- Retirees News



INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Local 86
2300 E. River Road
Rochester, N.Y. 14623
Tel: (585) 235-1510
Fax: (585) 235-0420

DAVID A. YOUNG, JR., Business Manager
DANIEL R. O'MEALIA, President
JOHN V. HAUCK, Financial Secretary

KNOW THE TRUTH ABOUT UNION DUES

Brothers and sisters of Easter Seals/FedCap,

January 25, 2018

The truth about Union dues is that the company is **"LYING"** to their employees about them. The company knows they can put fear into their employees by inflating and exaggerating the dollar amount by saying each of you will pay \$70, \$80 or even \$100 a week in Union dues. The Union knows that with the pay being what it is at Easter Seals/FedCap the dues structure needs to be adjusted to accommodate each of you. Therefore, the IBEW Local 86 is willing to give every employee in the bargaining unit at Easter Seals/FedCap a **"GUARANTEE"** that your Union dues will be 1% of your gross earnings each pay period, (every two weeks). For example; if you gross \$1,000.00 every two (2) weeks your Union dues would be \$ 10.00 every pay period, which breaking it down even further would equal out to be \$5.00 every week. The Union further agrees that with this **"DUES GUARANTEE"**, there will be **NO** initiation fee for the membership that are present to ratify this first time contract, anyone hired after this ratification would be subject to an initiation fee. You will not start paying any dues until a contract has been negotiated, ratified and approved by you the membership. Now I think you can clearly see how the company is **"LYING"** to you about Union dues. The question you have to ask is, **"WHAT ELSE WILL THE COMPANY LIE ABOUT?"**

The company will continue lying to you about issues involving the Union just to prevent you from exercising your legal right to form and join a Union, so they can keep you powerless and with **"no voice on the job."** The company knows that if you organize and form a Union you will have contractual rights that they will have to follow and you will no longer be an **"AT WILL"** employee that they can do whatever and whenever they want to. However, you as an employee at Easter Seals/FedCap have the power to stop the unfair treatment by voting **"YES"** February 7th to bring the IBEW Local 86 in to represent you. A Union contract would provide **"YOU"** the employee, with rights and protections that allow you to have negotiated scheduled raises, set working schedules, a grievance process, negotiated more affordable health insurance, vacation time, sick time, personnel time, not an unknown PTO formula that lumps everything into a bundle and keeps you guessing as to what you have available. Stay strong and stay informed, please attend the Union's next informational meeting when asked to. If you have any questions please contact, **IBEW Local 86 Organizer; Bruce Beal @ 585-727-0296.**

In Solidarity,

Bruce Beal

Organizer IBEW Local 86

President Finger Lakes AFL-CIO, Central Labor Council

Quality and Pride since 1899

Affiliated with:

AFL-CIO • N.Y. State AFL-CIO • Rochester Labor Council AFL-CIO
N.Y. State Electrical Workers Association • N.Y. State Building Trades Council

